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11 VIDEO SOFTWARE DEALERS ASSOCIATION
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12
13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16
17 VIDEO SOFTWARE DEALERS
ASSOCIATION and ENTERTAINMENT
18 SOFTWARE ASSOCIATION,

19 Plaintiffs,

20 vs.

21 ARNOLD SCHWARZENEGGER, in his official
22 capacity as Governor of the State of California;
BILL LOCKYER, in his official capacity as
23 Attorney General of the State of California;
GEORGE KENNEDY, in his official capacity as
24 Santa Clara County District Attorney, RICHARD
DOYLE, in his official capacity as City Attorney
25 for the City of San Jose, and ANN MILLER
RAVEL, in her official capacity as County
26 Counsel for the County of Santa Clara,

27 Defendants.

28 CASE NO. C-05-04188 RMW

PLAINTIFFS' OPPOSITION TO
APPLICATION OF COMMON SENSE
MEDIA FOR LEAVE TO PARTICIPATE IN
ACTION AS AMICUS CURIAE

1 Plaintiffs Video Software Dealers Association and Entertainment Software Association
 2 respectfully oppose the Application for Leave to Participate in Action as Amicus Curiae, filed by
 3 Common Sense Media (“CSM”) on February 1, 2006.

4 **I. INTRODUCTION**

5 CSM’s Application is both procedurally and substantively flawed, and should be denied.

6 Procedurally, CSM appears to request leave to participate generally and at will in this case,
 7 which is wholly inconsistent with the traditional role of an amicus curiae. There are no motions
 8 currently pending before the Court that CSM could comment on as an amicus, and it would be
 9 entirely inappropriate for CSM to “participate” in this case in the future as if it were a party.
 10 Substantively, CSM does not describe how it can assist the Court in addressing the matters at issue in
 11 this case. While CSM claims familiarity with the work of the experts relied on by the parties to the
 12 case (Application at 1-2 & 4), the Court’s record already contains voluminous documentation
 13 regarding those experts’ opinions; and if the Court is so inclined, the Court will itself have the
 14 opportunity to hear those experts testify. Although CSM claims familiarity with experts not cited by
 15 the parties, it declines to identify those supposed experts or explain how they may assist the Court in
 16 addressing the matters at issue in this case.

17 While its Application is far from clear, CSM appears to be seeking all of the rights of a party
 18 in this case. But it has presented no basis for participating in this fashion, or for believing that it can
 19 add anything (other than repetitive briefing) to what the parties to this case have already, or can in the
 20 future, present to the Court. Plaintiffs respectfully submit that CSM’s Application should be denied.

21 **II. LEGAL ARGUMENT**

22 **A. Amici Curiae Are Not Parties To The Action**

23 CSM’s Application appears to seek the right to participate generally in this matter. But “[a]n
 24 amicus curiae is not a party to litigation.” *Miller-Wohl Co. v. Commissioner of Labor & Industry*,
 25 694 F.2d 203, 204 (9th Cir. 1982). Even where the court grants an application to participate as an
 26 amicus, there are well-defined limitations: “[A]n amicus curiae is not a party and has no control over
 27 the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in
 28 the case.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1068 (N.D.

1 Cal. 2005). Indeed, an amicus’ “participation is restricted to suggestions relative to matters apparent
 2 on the record or to matters of practice.” *Id.* (citations omitted). “A petition to intervene and its
 3 express or tacit grant are prerequisites” to being afforded the rights and prerogatives reserved to
 4 parties. *Miller-Wohl*, 694 F.2d at 204.

5 CSM’s Application to participate generally in this case is wholly unjustified. CSM’s
 6 Application provides no basis for the Court or the parties to determine what CSM’s requested
 7 “participation” might entail. There is no question currently pending before the Court on which CSM
 8 might comment as an amicus. The Application offers no indication as to whether any limitations
 9 would or should cabin CSM’s future involvement. In short, CSM appears to be seeking a role as a
 10 “roving” amicus with a general right to participate in whatever matters it deems appropriate in the
 11 instant litigation. But there is no legal basis for such participation. The plaintiffs respectfully submit
 12 that this Court should reject CSM’s attempt to insert itself into this case as what amounts to a
 13 litigating party.

14 **B. CSM’s Participation Will Add Nothing But Repetitive Briefing**

15 A non-party fulfills “the classic role of amicus curiae by assisting in a case of general public
 16 interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped
 17 consideration.” *Miller-Wohl*, 694 F.2d at 204. Courts “welcome amicus briefs from non-parties
 18 concerning legal issues ... or if the amicus has ‘unique information or perspective that can help the
 19 court beyond the help that the lawyers for the parties are able to provide.’” *Sonoma Falls*
 20 *Developers, L.L.C. v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d, 921, 925 (N.D. Cal. 2003),
 21 (emphasis added), citing *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D. D.C. 2003). *See also Ryan v.*
 22 *Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir 1997) (noting that the “vast
 23 majority” of amicus filings are duplicative and essentially serve to extend the length of the allied
 24 litigant’s briefs, and labeling such briefs “an abuse”).

25 CSM claims that it satisfies three different “factors” that courts have considered in granting
 26 the right to file amicus briefs: 1) whether the matter at issue is “serious,” 2) whether the proposed
 27 amicus had been involved in events leading to the case and has an “interest” in the case, 3) whether
 28 the proposed amicus can ““assist[] in a case of general public interest, supplement[] the efforts of

1 counsel, and draw[] the court’s attention to law that escaped consideration.” Application at 3-4
 2 (citations omitted). But these “factors,” as represented by CSM, are either insufficient to justify
 3 amicus participation, or are not satisfied by CSM here.

4 **First**, CSM relies on an off-handed and unsupported comment, that an amicus can participate
 5 in a case based on “the serious nature of the issues involved” in that case. Application at 3, citing
 6 *Neeley v. Century Finance Co.*, 606 F. Supp. 1453, 1457 (D. Ariz. 1985). But there is no further
 7 discussion of this issue in the *Neeley* opinion, and this throw-away *dictum* is not logically supportable
 8 as a basis for amicus participation. *Every* lawsuit is “serious,” and involves “serious issues,” to the
 9 parties to the litigation. CSM’s apparent attempt to limit *Neeley*’s “seriousness” factor to cases
 10 involving constitutional questions is unavailing, as this would mean that any proposed amicus that
 11 wanted to file a brief in a constitutional case should be permitted to do so. The “seriousness” of a
 12 case is not a useful criterion to consider in determining whether an amicus filing is appropriate.

13 **Second**, CSM relies on an inapposite case to argue that a proposed amicus should be granted
 14 amicus standing if it had “involvement” in the events leading up to the lawsuit and an “interest” in
 15 the case. Application at 3-4, citing *Sonoma Falls Developers LLC*, 272 F. Supp. 2d at 925. In
 16 *Sonoma Falls* and a similar case, *NGV Gaming*, 355 F. Supp. 2d at 1067-68, the court allowed
 17 entities to file amicus briefs because they were actual parties to the contracts that were being litigated
 18 in those cases. *Id.*; *Sonoma Falls*, 272 F. Supp. 2d at 925. Thus in both of these cases, the “interest”
 19 in question was much more akin to a protectable legal interest than a generalized interest in the
 20 subject matter of the case. Indeed, in *NGV Gaming*, the amicus “urge[d] the dismissal of the entire
 21 action due to [the amicus’] status as a necessary and indispensable party” to the action. *NGV*
 22 *Gaming*, 355 F. Supp. 2d at 1063. Here, CSM acknowledges that the public’s interest in this statute
 23 is “represented by the defendants in this action” (Application at 4), but claims that its members’
 24 interests “are more particularized and therefore different from the general societal interest of the
 25 public.” *Id.* CSM’s unsupported claim should be disregarded – it appears that both CSM’s members
 26 and the “general public” (at least so far as it is represented by the defendants here) are interested in
 27 the same thing: upholding the statute at issue.

1 CSM also claims that it should “participate” as an amicus due to its “central involvement in
 2 the events leading up to this case,” specifically, co-sponsoring the bill in question and submitting
 3 “background memos” to the Governor and the Legislature. Application at 4. Assuming CSM was so
 4 involved, it will not aid the Court in considering this case. The primary question at issue here is
 5 whether AB 1179 is based on a compelling interest, and whether the Legislature used the least
 6 restrictive means available to further that interest. *Video Software Dealers Assn. & Entertainment*
 7 *Software Assn. v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1045-46 (N.D. Cal. 2005), citing *Sable*
 8 *Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Whatever interactions CSM may
 9 have had with legislators or the Governor regarding the statute does not bear on these ultimate
 10 questions, and likely would not be considered even if they did. *See Quintano v. Mercury Cas. Co.*,
 11 11 Cal. 4th 1049, 1062 n.5 (1995) (refusing to consider individual statements of legislators and
 12 sponsors of particular legislation regarding proper construction of a statute).

13 **Third**, CSM argues that it should participate as an amicus because it “has unique information
 14 and perspective that will aid the court in resolving this case.” Application at 2, 4. This “unique”
 15 information appears to be familiarity with the work of experts cited by the parties to the case, as well
 16 as “access to experts other than those that have been cited” in the briefing thus far. *Id.* at 4. Of
 17 course, “familiarity” with the work of cited experts is a flimsy basis, at best, for amicus participation.
 18 With respect to experts not cited by the parties thus far, CSM neither discloses the identity of these
 19 experts, nor indicates how they will assist the Court. CSM does not claim that these experts will aid
 20 the Court as to any issues “beyond the help that the lawyers for the parties are able to provide.”
 21 *Sonoma Falls, supra*, 272 F. Supp. 2d at 925. Notably, many of the experts’ papers and reports cited
 22 by the defendants in their voluminous Notification of Manual Filing, (*see, e.g.*, App. A at 14-18), also
 23 appear on CSM’s website. *See* “Violent Video Games and Our Kids,” Common Sense Media (2005),
 24 available at http://www.commonsemmedia.org/Violent_Video_Games.pdf (citing studies by
 25 Anderson, Funk, Tompkins, Walsh, the Kaiser Family Foundation, and the Federal Trade
 26 Commission, which also appear in defendants’ Appendix).

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28 //

III. CONCLUSION

CSM’s application to “participate as amicus” in this case is improper, both because it does not seek to limit CSM’s participation in the case to the proper role of an amicus, and because it does not demonstrate in any way what CSM will add to this litigation apart from duplicative briefing.

Plaintiffs respectfully submit that CSM's application should be denied.

DATED: February 7, 2006

Respectfully submitted,

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By: _____ /s/
Ethan D. Dettmer

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